United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2336

United States Court of Appeals

FOR THE SECOND CIRCUIT

CBS INC.,

Plaintiff-Appellant,

against

STOKELY-VAN CAMP, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Case No. 74-2336

CBS INC.,

Plaintiff-Appellant,

v.

STOKELY-VAN CAMP, INC.,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

Preliminary Statement

Plaintiff CBS Inc. (CBS) appeals from a judgment (83a)* entered by the United States District Court for the Southern District of New York on September 5, 1974, pursuant to an opinion and order** (68a) of Judge Inzer B. Wyatt dated August 30, 1974, denying its motion for summary judgment and granting Stokely-Van Camp, Inc.'s (Stokely) motion for summary judgment dismissing the complaint.

Statement of Issues Presented

1. Did the District Court err in concluding that Lennen & Newell, Inc. ("Lennen"), Stokely's advertising agency

*References are to pages of the Joint Appendix.
**Not reported.

for seventeen years, did not have authority, either express or apparent, to enter into contracts with CBS for the broadcast of Stokely television commercials as agent for and on the credit of Stokely?

2. Assuming that Stokely is bound by the contracts executed in its behalf by Lennen, was the District Court correct in holding that CBS is estopped by its own conduct from recovering from Stokely amounts due under the provisions of the contracts and in failing to hold that Stokely is estopped from asserting against CBS the wrongdoing of its agent Lennen?

Statement of the Case

A. Facts

CBS, a New York corporation, operates five television stations and a television network which transmits television programs to its five stations and, pursuant to affiliation agreements, to approximately 200 independently owned and operated television stations. CBS is also engaged in selling time for commercial announcements broadcast in association with programs on the broadcasting facilities of its own television stations and of those of its affiliated stations which accept programs transmitted by the CBS network. (9a-10a, pars. 2, 4 and 5).

Stokely is an Indiana corporation engaged in the production, distribution and sales of various food products throughout the country. It has for many years utilized advertising, including television commercials, in connection with the promotion and sale of those products. (9a, par. 3).

Lennen, a New York advertising agency, had been employed by Stokely as its advertising agency for seventeen

years up until March 23, 1972, pursuant to an unwritten arrangement with Stokely. (10a, par. 6).

During the period from December 1970 through September 1971, Lennen entered into fifteen network and station written contracts with CBS for the broadcast of television commercials advertising Stokely's products expressly, as stated in the contracts, "acting as agent for Stokely-Van Camp, Inc.".* These contracts included two network contracts in April 1971 for the broadcast of commercials totaling $261,684** and thirteen station contracts entered into at various times throughout the period for the broadcast of commercials totaling $166,813.33. CBS fully performed its obligations under the contracts by broadcasting the commercials as scheduled by Lennen, with the knowledge of Lennen and Stokely. (10a, par. 9) The total due to CBS of $428,497.33 was paid by Stokely to Lennen at intervals during the period, but Lennen, which is now in bankruptcy, failed to forward those payments to CBS.

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*The District Court's opinion correctly noted that all but one of the 13 station contracts were signed by both parties and that the original of the 13th contract could not be located (72a). However, the District Court, while noting that the two network contracts were not signed but were forwarded with a covering letter by CBS to Lennen (70a, 71a), failed to note that the covering letters (Exs. C, G), contained the significant sentence:

> "Until any modifications have been mutually agreed on, the enclosed Agreement shall constitute the understanding between us with respect to this purchase."

Thus, the contracts were plainly accepted by Lennen by its action in forwarding the commercials to be broadcast.

**In his opinion (72a), Judge Wyatt indicated that a discrepancy of $2,579 exists between the total amount of the outstanding network invoices and the total amount CBS claims is due under the two network contracts. The amount of that discrepancy coincides with a credit memo issued by CBS on September 2, 1971, and found among the invoices in Exhibit E. Thus, Judge Wyatt's speculation that the difference may have been a credit due to Lennen is correct, but it *is* reflected in the papers. The network figure of $261,684 included in the total sum for which suit is brought is thus a correct figure.

B. Proceedings Below

CBS instituted this action on April 25, 1972. Thereafter, pursuant to a program of informal discovery, the parties exchanged copies of all documents relating to the subject matter of this action.* Among the documents produced by CBS were the fifteen contracts in suit and all correspondence and invoices relating thereto (Exs. A through HH), materials generated by Lennen for distribution to its creditors (Exs. LL, MM), CBS internal memoranda and correspondence (Exs. OO, PP) and CBS monthly reports concerning the status of all past due advertiser accounts receivable (Ex. TT) and of advertiser accounts receivable from Lennen (Exs. UU, VV). Stokely produced correspondence from it to Lennen (Ex. QQ) and samples of invoices from Lennen to Stokely with respect to the Stokely commercials broadcast by CBS pursuant to the contracts in suit (Exs. RR, SS).

Following this exchange of documents, CBS took the deposition of W. Marcus Newberry, Vice President and Director of Marketing for Stokely. Stokely took the depositions of Louis J. Rauchenberger, Controller of the CBS Network Division, Louis W. Werle, former Credit Manager of Collections for the CBS Network Division (who retired in February 1972), Marvin Schrager, former credit Manager of Collections of the CBS Stations Division (who left CBS in November 1972) and John Ginway, a CBS salesman. In addition, the parties entered into the stipulation of fact previously cited at pp. 2-3.

In March 1974 both parties moved for summary judgment pursuant to Rule 56, Fed. R. Civ. P. CBS contended that Lennen had authority, both express and implied, as Stokely's agent to enter into the fifteen contracts

*These documents are compiled in the volumes entitled Primary and Secondary Documentary Exhibits, which have been reproduced for the Court's convenience.

in Stokely's behalf, that payments by Stokely to its agent Lennen did not satisfy its contractual obligations to CBS, that there is no factual or legal support for Stokely's affirmative defense that CBS's own conduct constitutes a bar to recovery and that Stokely is estopped from asserting against CBS the wrongdoing of its agent Lennen. Stokely maintained that Lennen lacked authority to bind its credit or make it directly liable to CBS, that its payments to Lennen discharged it of any obligation for the broadcast by CBS of its commercials and that CBS's failure to advise Stokely that it had not received payments from Lennen bars it from any recovery in this action. Both parties agreed that there were no material issues of fact in dispute.

On August 30, 1974, the District Court rendered its decision directing that judgment be entered in favor of Stokely dismissing the complaint. The Court held that Lennen had neither actual nor apparent authority to make a contract with CBS binding Stokely as principal. (80a, 81a) It further held that under the principle of estoppel CBS is not entitled to recover from Stokely. (82a) Judgment was entered on September 5, 1974, and CBS filed its notice of appeal on October 4, 1974.

ARGUMENT

I.

The District Court's Holding that Lennen was Without Authority to Enter Into Contracts In Stokely's Behalf is Contrary to Legal Precedent and Contradicted By the Facts.

It is uncontested that in dealing with CBS concerning the commercials for which payment is now sought, Lennen represented itself to be, and acted as, agent for a disclosed

principal, Stokely. The courts of New York and most other jurisdictions have held that the relationship between advertiser and advertising agency is that of principal and agent, a holding that is borne out by the facts in the instant case. Moreover, by reason of its position as advertising agency for Stokely, Lennen had both express and apparent authority to bind Stokely.

A. Lennen Was Stokely's Agent

Section 1 of the Restatement of the Law of Agency, Second (1958) defines agency as follows:

> "(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> "(2) The one for whom action is to be taken is the principal.
>
> "(3) The one who is to act is the agent."

With regard to liability based on agency principles, § 140 of the Restatement declares:

> "The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that:
>
> "(a) the agent was authorized;
>
> "(b) the agent was apparently authorized; or
>
> "(c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority."

Based on these definitions, in most of the cases in which the question has arisen the courts have found that in preparing and placing advertising matter an advertising agency acts as the agent of the advertiser." Annot., 53 A. L. R. 2d 1139, 1142 (1957).

In *Clarke* v. *Watt,* 83 Misc. 404, 145 N. Y. S. 145 (Sup. Ct. App. Term, 1st Dep't 1913), the leading New York case on the subject, plaintiff publisher entered into a contract with an advertising agency for the sale of column space in its newspaper. The contract did not identify the advertiser but indicated that the agency was contracting for the benefit of another. Plaintiff sued the advertiser for the purchase price of the column space after the agency failed to respond to plaintiff's periodic statements. The court held that, in contracting with an advertising agency, plaintiff was entitled to assume that there was a principal on whose behalf advertising space was being sought. Therefore, even though the contract was with the agency, plaintiff could look solely to the defendant advertiser for payment for the space purchased on its behalf.

Despite the fact that the majority opinion in the *Clarke* case has never been reversed, modified or questioned by any New York court, the District Court elected to agree with the dissenting opinion (which held that the agency was either an independent contractor or had been treated as such by the plaintiff) and determined that "the decision seems of no moment. . . ." (81a) On the contrary, the majority opinion would seem to apply with greater force to the instant action, since Lennen was at all times acting for a disclosed principal whose identity was an integral part of every contract.

The District Court's "disagreement" with the decisional law of New York is not shared by other jurisdictions. Ever since the *Clarke* decision, the rule that an advertising agency

acts as an agent of the advertiser in preparing and placing advertising matter has received firm support. In *H. W. Kastor & Sons Advertising Co.* v. *Grove Laboratories,* 58 F. Supp. 1011 (E. D. Mo. 1945), the court observed (at p. 1016):

> "As to the relationship generally of an advertising agency, conducting a radio advertising campaign and its client, see 2 Socolow, The Law of Radio Broadcasting, § 339 (1939): 'Upon its engagement by the sponsor to plan and execute an advertising campaign, the agency usually functions as an agent. It acts for and represents the client in dealings with the broadcast station, the program producer, the artists and all other persons concerned in the program sponsored by the client. * * * In view of these qualifications, the advertising agency has the legal characteristics of an agent.'"

In *Store of Happiness* v. *Carmona & Allen,* 312 P. 2d 1104 (Cal. App. Div. 1957), the court reached a similar result. There plaintiff, a retail store, engaged the defendant advertising agency to handle its account. Defendant, among other things, directly contracted with a television station to purchase on plaintiff's behalf available spot time. The contracts specified a flat rate and were administered in the same manner as the contracts between CBS and Lennen & Newell (the station billed the agency for the purchase price less 15% commission and the agency billed the advertiser for the full amount). The advertiser sued the agency to recover additional amounts retained by the agency in the form of "frequency discounts" awarded by the station to advertisers as an incentive for continued use of its facilities. Plaintiff argued that, as its agent, defendant was not permitted to earn a secret profit and was limited to the usual 15% commission common in the trade. The court rejected defendant's argument that it was an independent contractor

and, after reciting the above facts, held that an agency relationship existed in connection with the purchases by defendant of air time for the advertisement of plaintiff's store.

Marcus Loew Booking Agency v. *Princess Pat,* 141 F. 2d 152 (7th Cir. 1944) and *Bamberger Broadcasting Service, Inc.* v. *William Irving Hamilton, Inc.,* 33 F. Supp. 273 (S. D. N. Y. 1940), are in accord. Indeed, these decisions and others like them make it clear that CBS is without recourse to suit against Lennen on the obligations here in suit. Its only remedy is against the advertiser. *American Broadcasting-Paramount Theaters, Inc.* v. *American Mfrs. Mutual Insurance Co.,* 42 Misc. 2d 939, 249 N. Y. S. 2d 481 (Sup. Ct. N. Y. Co. 1963), *aff'd,* 20 App. Div. 2d 890 (1st Dep't 1964), *aff'd,* 17 N. Y. 2d 849, *cert. denied,* 385 U. S. 931 (1966); *Keskal* v. *Modrakowski,* 249 N. Y. 406, 408 (1928); *Cangold, Inc.* v. *Rickles,* 11 Misc. 2d 814, 174 N. Y. S. 2d 493, 495 (Sup. Ct. Queens County 1958), *Mod. on other grds.,* 7 App. Div. 2d 911 (2d Dep't 1959). This was made patently clear in *Levey* v. *Orcurto,* 73 N. Y. S. 2d 202, 204-205 (Sup. Ct. N. Y. Co. 1947), where the court declared:

> " 'The recognized rule is that, "when the execution of a contract is by written obligation, or sealed covenants, *the agent cannot be sued upon the instrument itself, unless there be apt personal* contractual words of his own, or *he sign it as his own.*" Stephenson v. Dodson, 36 Pa. Super. 343, 350; Bala Corporation v. McGlinn, 295 Pa. 74, 144 A. 823. There can be recovery against the agent only in such case where he assumes, by appropriate words, individual responsibility (Lucas v. Bode [and Heinz], 94 Pa. Super. 248), as in the case of one who agrees to pay commissions without declaring he is acting for another. Lieberman v. Colahan, 267 Pa. 102, 110 A. 246.

> *But this personal assumption must be shown, and is negatived, if, as here the body of the contract, as well as the signature, discloses that he is acting only as agent for another.*" (Emphasis in the original)

Application to this case of the long-standing rule that an advertising agency acts as an agent of the advertiser in preparing and placing advertising matter is further bolstered when one looks at the fact pattern of the instant action.

Lennen served as Stokely's advertising agency for over 17 years (Newberry dep., 87a).* Stokely had knowledge that Lennen was transacting business with various broadcast media in order to effectuate the appearance on radio and television of commercial announcements on its behalf (Newberry dep., 87a), and that these announcements were being broadcast on its behalf by CBS (Newberry dep., 88a). At no time prior to the running of the advertisements in suit did Stokely ever indicate to CBS or any other third party that Lennen was not acting as its agent with regard to its many advertising activities (Newberry dep., 95a-96a). Indeed, Stokely gave definite affirmative indications that Lennen was, in fact, acting on its behalf. As stated by Newberry: ". . . in the respect of Media salesmen or these kind of people calling on our people and soliciting for their particular thing. We would indicate to these people that Lennen & Newell was our agency and they were wasting my time and to contact Lennen & Newell" (96a).

The record also demonstrates that Stokely exercised considerable control over Lennen's activities, a factor that weighs heavily in determining the existence of an agency relationship (Restatement § 1, *supra* at p. 6). For instance, Newberry explained that when Stokely changed the

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*W. Marcus Newberry is Vice President and Director of Marketing for Stokely.

company's marketing concept, Lennen changed its approach to match that concept (Newberry dep., 88a), that Lennen played an active part in the formulation of Stokely's annual marketing plans (Newberry dep., 88a-89a), that the television commercials prepared pursuant to those plans were the product of collaboration among the Stokely product group and Lennen personnel (Newberry dep., 89a), that, although Lennen was given discretion to find the "best buy available" for placing Stokely's commercials, its arrangements in that regard were subject to Stokely management approval (Newberry dep., 90a-91a) and that all Lennen invoices with respect to the broadcast of commercials by the media were checked against the budget before approval for payment by Stokely (Newberry dep., 91a-92a). Thus, Lennen was an integral part of Stokely's marketing activities, beginning with the formulation of broad marketing plans, playing an active part in the formulation of budgets to implement those plans, participating with Stokely personnel in the preparation of advertisements pursuant to those plans and, subject to final approval by Stokely management, placing those advertisements for broadcast by CBS and others. Indeed, the fact that CBS and Stokely personnel never communicated with one another concerning these arrangements is consistent with the fact that Lennen was merely Stokely's alter ego in all matters relating to advertising.

Furthermore, the District Court's application of the minority view in the *Clarke* case to the facts in the instant action and its conclusion that CBS dealt with Lennen as an independent contractor (80a-81a) are refuted by the record. Thus, Rauchenberger, Controller of the CBS Network Division, testified that

> "it is against our policy to ever sell to an agency without selling to the client. We will not let the

> agency be a broker for our time. The salesmen never make a sale except for a specific advertiser" (110a).

The testimony of Ginway, a CBS salesman, confirms that that policy was followed in the case of Stokely commercials. Ginway explained that all negotiations with Lennen were with respect to the particular Lennen client who had authorized it to spend a stated amount of money for the advertisement of its products over a given period of time. In negotiating with Ginway for the placement of commercials, Lennen sought a package of either prime time or day time, depending upon the particular client and its products to be advertised (Ginway dep., 174a). Thus, all dealings by CBS with Lennen were with respect to a known sponsor whose products were to be advertised and the purpose of such dealings was to prepare a package best suited to the advertising needs of the client who had authorized Lennen to make arrangements for the advertisement of its products.

All of this is, of course, confirmed by the express language of the 15 contracts governing the transactions here in suit, which expressly stated that Lennen was acting "as agent for Stokely-Van Camp, Inc."

In short, both established case law and the fact pattern of this action support the proposition that Lennen, in placing advertisements with CBS on behalf of Stokely, was acting as agent for a disclosed principal.

B. Lennen Had Authority to Bind Stokely

As agent, Lennen had authority to act for Stokely. We believe this subject can be approached most appropriately by reference again to the American Law Institute's Restatement of the Law of Agency, Second. Thus, Section 7 of that Restatement states:

> "Authority is the power of the agent to affect the legal relations of the principal by acts done in accord-

ance with the principal's manifestations of consent to him."

Comment b to that section is instructive. It states:

> ". . . The agent's conduct is authorized if he is reasonable in drawing an inference that the principal intended him so to act although that was not the principal's intent. . . ."

Expanding on § 7, § 35 sets forth:

> "Unless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it."

Illustration 1 to that section is also instructive. It states:

> "1. P authorizes A to purchase and obtain goods for him but does not give him money to pay for them. There being no arrangement that A is to supply the money or buy upon his own credit, A has authority to buy upon P's credit."

Further elaborating on § 7, § 50 states:

> "Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it."

That rationale was emphasized by the Court of Appeals in *Rolfe* v. *Hewitt,* 227 N. Y. 486 (1920), with a statement (p. 491):

> "A servant is acting within the scope of his employment when he is engaged in doing for his

> master what he has been directed to do, or as Mechem on Agency (Vol. 2, sec. 1875) says: 'Any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct and logical result of it.' "

Further elaborating on § 7, the Restatement sets forth in § 44, as follows:

> "If an authorization is ambiguous because of facts of which the agent has no notice, he has authority to act in accordance with what he reasonably believes to be the intent of the principal although this is contrary to the principal's intent; . . ."

Comment a to that section is helpful:

> "a. *Rationale.* The rule stated in this Section throws upon the principal the burden of reasonable mistakes which the agent makes in the interpretation of his authority and which result from the ambiguity of the authorization caused by facts of which the agent has no notice. The rule is the logical result of the underlying theory of agency by which the agent has a duty to act in accordance with what he reasonably believes to be the principal's desires. From this standpoint, he has not only a privilege to act but ordinarily also a duty to act and hence should be protected. The third person is an incidental beneficiary of the fact that the agent is authorized. . . ."

In the light of these authorities, the District Court's statement (76a) that it "is clearly established that Lennen had no actual authority to contract with CBS on behalf of Stokely" is incomprehensible as is its statement (81a) that

there was no employment of Lennen "to pledge Stokely's credit". We submit that action taken by Lennen in making arrangements for advertising for Stokely comes squarely within the rule which we have set forth. Certainly Lennen reasonably concluded that it had the authority to contract for advertising explicitly on behalf of Stokely. That authority was incidental to that which it was told to do by Stokely and, as such, will be inferred. If the authority was ambiguous, the risk of ambiguity must be that of Stokely. Lennen was doing precisely that which Stokely told it to do and Stokely must be bound thereby.

In his affidavit, submitted in support of Stokely's motion for dismissal, Newberry, Stokely Vice President, for the first time, stated:

> "Stokely's arrangement with L&N was for L&N to purchase media space or broadcast time on L&N's sole responsibility and credit, and not upon Stokely's credit or in its name. . . ." (23a)

But that "arrangement" was certainly not as a result of any contractual or other understanding with Lennen, since Newberry testified that Stokely and Lennen never communicated regarding the subject:

> "Q Now, can you identify Plaintiffs' Exhibit 3 for identification as having been sent by Mr. Stokely to Lennen and Newell on or about December 8, 1971? A Yes.
>
> "Q Prior to that date, had there been any other communications of any nature between Stokely-Van Camp and Lennen & Newell with respect to the basis on which Lennen & Newell was contracting for television time? A Not to my knowledge." (93a)

And, again, Newberry testified at his deposition (88a):

> "Q Now, prior to December 1971, did you have any knowledge concerning the nature of any contractual arrangements entered into by L&N with CBS with respect to the broadcast of your commercials? A No.
>
> "Q Did you have any knowledge as to payments by Lennen & Newell to CBS with respect to those broadcasts? A No.
>
> "Q Did you make any inquiries of Lennen & Newell as to the basis of any commercial arrangements or contractual arrangements they made with CBS? A No.
>
> "Mr. Loflin: Would you read back the last three questions and answers, please."

Patently, the "arrangement" was merely Stokely's wishful thinking, not communicated to Lennen.

Equally misleading was the statement by Ames of Lennen (66a) that

> "The practice in the industry to my knowledge always has been for the networks to look solely to the agencies for payment of their bills."

Patently, Ames was merely referring to the industry practice as stated in a CBS letter of March 15, 1971, to Lennen (Ex. PP) as follows:

> "As you know, our basic contractual arrangement is with the advertiser, and we deal with advertising agencies as legal agents of these sponsors. The practice of being paid through the agency has developed over the years as a convenience to the sponsor and a service provided by the agency, but it does not alter our basic contract with the sponsor directly."

Furthermore, Lennen had apparent authority to act for Stokely. Stokely for 17 years knew that Lennen was transacting business with various broadcasting media in order to effectuate the appearance of commercial announcements on television on its behalf (Newberry dep., 87a), and knew that substantial amounts of money were contracted for with CBS (Newberry dep., 90a-91a). Stokely knew prior to the CBS broadcasts that they were being broadcast on its behalf (Newberry dep., 88a, 89a-90a; 10a, pars. 7, 8) and Stokely paid all the Lennen invoices with respect to the CBS broadcasts without objection (Newberry dep., 91a-92a, 96a). Despite that, Stokely asserts that it had no knowledge of the actual contracts between Lennen and CBS (Newberry dep., 97a), that it made no inquiry whatsoever of either Lennen or CBS with respect to those conctractual arrangements and that it did not tell CBS that Lennen was not its agent (Newberry dep., 88a, 93a). Against that background, Stokely did absolutely nothing. Thus, Newberry testified (95a-96a):

> "Q Prior to January 1, 1972, had Stokely-Van Camp ever indicated to third parties that Lennen & Newell was not acting on its behalf in connection with its various advertising activities? A No."

He also testified (96a):

> "Q Prior to January 1, 1972, had Stokely-Van Camp indicated to third parties that Lennen & Newell was acting on its behalf in connection with the advertisement of Stokely-Van Camp products? A Yes. I am rather confused about that question.
>
> "The Witness: Would you repeat that.
>
> "(The question was read)

"A A qualified yes in the respect of Media salesmen or these kind of people calling on our people and soliciting for their particular thing. *We would indicate to these people that Lennen & Newell was our agency and they were wasting my time and to contact Lennen & Newell.*

"Q Do you recall any inquiries from CBS personnel? A No." (Emphasis supplied).

Those facts bring this case precisely within the legal intendment of apparent authority. Again we start with the Restatement of the Law of Agency, Second, § 8 which sets forth:

> "Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons."

Comment b to that section applies here:

> "The manifestation of the principal may be made directly to a third person, or may be made to the community, by signs, by advertising, by authorizing the agent to state that he is authorized, or by continuously employing the agent. . . ."

Expanding on § 8, the Restatement sets forth in § 27 as follows:

> ". . . apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

Comment a to § 27 expands:

> ". . . So, too, a person who permits another to do an act in such a way as to establish in a community a reputation for having authority to act, either by directing the agent so to represent, or by directing him to act and doing nothing to prevent the spread of such information by the agent or by others, creates apparent authority with respect to those who learn of the reputation. Third persons who are aware of what a continuously employed agent has done are normally entitled to believe that he will continue to have such authority for at least a limited period in the future, and this apparent authority continues until the third person has been notified or learns facts which should lead him to believe that the agent is no longer authorized. . . ."

Again, the facts of this case bring it precisely within the legal intendment of apparent authority so as to hold Stokely for the acts of Lennen.

Despite the fact that Lennen performed continuous and substantial actions on behalf of Stokely for seventeen years, Stokely asserted in support of its motion below that CBS was required to ascertain the extent of Lennen's authority before entering into the contracts in suit. However, it is undisputed that Stokely authorized Lennen to arrange with the media for the broadcast of Stokely commercials, and that the only limitation upon Lennen's authority of which CBS was aware was the monetary stricture imposed on the agency by the annual and quarterly advertising budgets. Even if we assume that Stokely specifically prohibited Lennen from contracting in its name or on its credit, CBS

cannot be held responsible for failing to discover the existence of those limitations on Lennen's authority.

§ 161 of the Restatement provides as follows:

> "A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized."

Comment a to that section explains the rationale for the rule:

> ". . . It is based primarily upon the theory that, if one appoints an agent to conduct a series of transactions over a period of time, it is fair that he should bear losses which are incurred when such an agent, although without authority to do so, does something which is usually done in connection with the transactions he is employed to conduct. . . . Commercial convenience requires that the principal should not escape liability where there have been deviations from the usually granted authority by persons who are such essential parts of his business enterprise. In the long run it is of advantage to business, and hence to employers as a class, that third persons should not be required to scrutinize too carefully the mandates of permanent or semi-permanent agents who do no more than is usually done by agents in similar positions."

The law in New York is in accord. In *Cohen* v. *Goldstein,* 128 N. Y. S. 69 (Sup. Ct. App. Term 1911), the issue was whether defendant's agent had authority to enter

into an employment contract with the plaintiff. The evidence established that the agent had authority to hire and fire defendant's employees, but defendant contended that the agent lacked authority to enter into contracts of employment. The court, in finding for plaintiff, stated:

> "Although it is true, as a general rule, that a third person, dealing with an agent, should ascertain the agent's authority or deal with him at his peril, and 'that a special agent cannot bind the principal, where he acts outside the scope of his authority, this rule is subject to this qualification: That where an agent is intrusted to do a particular kind of business, he becomes, as between the principal and parties dealing with him, the general agent for the transaction of that business; and his acts, as between his principal and strangers, in that particular line, will bind the principal, although he violates some private instruction given by his principal, not known to the public.' " 128 N. Y. S. at p. 70 (Citations omitted).

The rationale for this well-established exception to the general rule was explained in *Globe & Rutgers Fire Ins. Co.* v. *Warner Sugar Refining Co.,* 187 App. Div. 492, 176 N. Y. S. 3 (1st Dep't 1919):

> ". . . The reason for this rule is obvious. No man is at liberty to send a man forth to deal for him, with secret instructions as to the manner in which he is to execute his agency, which are not communicated to those with whom he deals and then when his agent has deviated from those instructions to say that he was a special agent, that the instructions were a limitation upon his authority, and those that dealt with him acted at their peril. If the principal

> deemed the transaction to his advantage, the instructions would remain a secret, and he would obtain the benefit. If in his opinion it was otherwise, he could escape liability." 176 N. Y. S. at p. 5.

Having for seventeen years accepted the benefits of Lennen's services rendered as agent on its behalf, Stokely cannot maintain at this late date that CBS had no reason to believe that Lennen was authorized to enter into contracts on Stokely's behalf or that CBS must bear the loss on transactions that clearly were within the scope of Lennen's apparent authority. There is thus no basis in the record for the District Court's statement (81a) that CBS could not "reasonably" have relied on Lennen's apparent authority.

Application of that doctrine in New York is expanded upon in 2 N. Y. Jurisprudence §§ 88 and 92 on Agency. Section 88 states (footnotes omitted):

> "The reliability of a principal for his agent's acts within the apparent authority of the latter is the result of the equitable doctrine that when one of two innocent persons must suffer from the act of a third person, he must sustain the loss who has enabled the third person to do the injury. The principal's liability in this respect has been said to be based essentially on estoppel. Whether apparent authority is based upon the principle of estoppel or not, it implies a transaction which is itself invalid as beyond the actual authority of the agent, and a person who is forbidden for equitable reasons to set up that invalidity."

Section 92 states (footnotes omitted):

> "The liability of a principal for acts within his agent's apparent authority is said to be based upon

> estoppel. Apparent authority has been defined as that authority which the principal holds the agent out as possessing or which he permits the agent to represent that he possesses and which the principal is estopped to deny. Accordingly, stating the rule as one of estoppel, where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority."

The New York Court of Appeals has spoken in like vein. Thus in *Hanover Nat'l Bank* v. *American Dock and Trust Co.,* 148 N. Y. 612, 620 (1896):

> "Thus the authority of an agent is enlarged, as to third persons, by implication, when the principal permits him to do acts not expressly authorized. For the protection of innocent persons the law will imply authority in an agent to do acts which, although forbidden by the principal before they are done, are, nevertheless, recognized by him as valid after they are done. If, through inattention or otherwise, the principal suffers his agent to act beyond his authority without objection, he is bound to those who are not aware of any want of authority to the same extent as if the requisite power had been directly conferred. (*New York & New Haven R. R. Co.* v. *Schuyler,* 34 N. Y. 30, 58.)"

Also, in *Taylor* v. *Commercial Bank,* 174 N. Y. 181 (1903), it is concluded (p. 188):

> "It is an established principle of law that where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose. (*Garner* v. *Magnam,* 93 N. Y. 642; *Krumm* v. *Beach,* 96 N. Y. 398; *Fairchild* v. *McMahon,* 139 N. Y. 290.)"

The situation is somewhat akin to the doctrine of affirmance as set forth in the Restatement § 94, as follows:

> "An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it."

Illustration 3 to § 94 is also germane:

> "3. A, a clerk employed by P but having nothing to do with advertising, places an order with T for advertising in P's name for a period of six months. P learns of the act and although knowing that T is preparing copy, does nothing. There is evidence of affirmance."

Nor is there any support in the record for the District Court's finding that CBS did not rely on Lennen's apparent authority (81a). As the very contracts in suit proclaimed, at all times CBS dealt with Lennen "as agent for Stokely-Van Camp". (See also Rauchenberger and Ginway testimony, *supra* at pp. 11-12.)

Finally, CBS was certainly entitled to assume that Stokely knew its business and was equally knowledgeable

concerning Lennen's affairs. As stated by Rauchenberger, CBS Controller:

> "Q You spoke at some length a few minutes ago about the corporate policy concerning the sales to advertisers as distinguished from the sales to advertising agencies. What steps were taken to inform your advertisers that that is your policy? A You know, it has been the standard practice for so long I think it is generally understood in the industry that that is our practice. I don't think we have to go out and broadcast what has been the existing practice ever since the network started.
>
> "Q At any time in 1970, '71 or early '72, did you take any steps to inform Stokely-Van Camp that that was your policy? A No, no.
>
> "Q Are you aware of any time from 1970 that CBS informed Stokely-Van Camp that that was their policy? A It is my assumption that Stokely-Van Camp was aware that they were the client and we were looking to them for payment. They are a major advertiser and I assume they have knowledge of the business they are doing." (111a-112a).

II.

The District Court's holding that CBS is estopped by its own conduct from proceeding against Stokely is not supported by the record.

Stokely's affirmative defense of estoppel and the District Court's findings with respect thereto proceed on the assumption that (a) CBS knew at all relevant times that Lennen was in precarious financial difficulty, (b) CBS knew that

Stokely was unaware of Lennen's defaults and impending insolvency and (c) CBS knew that Stokely was continuing to make payments to Lennen after Lennen's financial difficulties had become common knowledge in the industry. (82a) Each of those assumptions is refuted by the record.

Moreover, the evidence clearly shows that the parties' respective positions vis-a-vis the events in the fall of 1971 are the result of falsehoods told to both of them by Lennen. Lennen lied to CBS by telling it that Stokely was aware of its problems and that Stokely had made all outstanding payments to Lennen prior to the inception of meetings between CBS and Lennen. Lennen in turn defrauded Stokely by misappropriating funds and by lying to Stokely concerning the basis of its contracts with CBS when it well knew both what those contracts said and, as CBS had expressly advised Lennen, that it would hold Stokely to those contracts. Thus, without citation to authority, the District Court has permitted Stokely to escape liability by asserting the wrongdoing of its own agent as a defense to the action.

A. CBS Was Not Aware of the Extent of Lennen's Financial Problems

Stokely, which never took any steps to insure that sums paid by it to Lennen were promptly and properly forwarded by Lennen to CBS (Newberry dep., 95a), which never took any steps to ascertain whether sums paid by it to Lennen for CBS were being segregated by Lennen (Newberry dep., 95a) and which neither contracted with Lennen for an audit (Newberry dep., 95a) nor actually held any audit until after January 1972 (Newberry dep., 94a-95a), has cast the onus of its complete reliance on Lennen's integrity and financial stability on CBS by stating that CBS should

have told it something. There is no merit in this contention.*

First, even assuming that Stokely's position is meritorious, let us analyze just what payments CBS should be estopped from recovering. Estoppel can run only to Stokely payments to Lennen made (1) after Lennen had ceased forwarding payments to CBS, (2) after CBS had knowledge that Lennen was in a precarious financial position, (3) after CBS had knowledge that Stokely had further payments to make to Lennen and (4) after CBS had knowledge that Stokely had not been informed of Lennen's precarious financial position. Requirements (3) and (4) did not occur

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*The District Court was misled by the fact that CBS, who looked to the credit of its advertisers, made all its checks of current receivables by checking the advertiser receivables of advertisers represented by individual agencies. The rationale is quite simple and is found in the nature of the advertiser agency system, designed to relieve advertisers of the necessity of dealing direct with the media with whom they are contracting. Under that system CBS, who looked to the individual advertisers for ultimate payment, kept track of the ability of the agencies to make that payment initially. If an agency lost that ability, CBS would not accept further advertising through that agency, thus protecting the individual advertisers, and CBS, *for the future*. But the system could not very well protect advertisers with regard to past payments since presumably the individual advertisers had satisfied themselves of the stability of the agencies who represented them before making those payments. While the advertisers, by the agency system, were relieved of the necessity of dealing direct with the media, that did not relieve them of the responsibility of checking the integrity and stability of their agents. Thus it was that CBS, as did the other media, kept track of total advertiser receivables of advertisers represented by each agency. CBS can hardly be charged with the additional responsibility of checking the current credit of each agency prior to the agency's receipt of payments from individual advertisers it represented. That was the duty of the individual advertisers—a duty that Stokely naively and irresponsibly failed to fulfill. Lennen was its agent and not the agent of CBS, and in this instance, additionally, Lennen had assured CBS both that Stokely knew of the Lennen financial posture (which Stokely certainly should have known prior to making payments to Lennen) and that Stokely had made all payments. The District Court's misinterpretation of the CBS dealings with Lennen is thus entirely without a valid basis.

in 1971. Requirement (2) did not occur until the end of November 1971 and December 1971. Requirement (1) did not occur as to network payments until August 1971 and as to station payments until July 1971.

As appears from Exhibit 1 to the stipulation (11a-1), all network payments by Stokely to Lennen were completed by September 7, 1971. There can be no possible estoppel with respect to those payments since Lennen continued to make network payments to CBS through July 30, 1971, and nothing that happened between July 30, 1971, and September 7, 1971, would cause CBS to doubt Lennen's financial posture. By the same token, Lennen continued to make station payments to CBS to July 9, 1971, while all station payments by Stokely to Lennen were paid by June 30, 1971, with the exception of $37,926.15 in November 1971 and $1,724.65 thereafter. All that the estoppel aspect of the case involves is the $39,650.80 of station payments made by Stokely to Lennen in November 1971 and thereafter and whether CBS had some duty, because of its knowledge, prior to November 1971, to impart that knowledge to Stokely. The District Court's holding that CBS is estopped from any recovery, in addition to being unsupported in the record, thus ignores the essential fact that Stokely had already forwarded over 90% of the funds in issue, *i.e.,* $388,846.53 of the total of $428,497.33, to Lennen before Lennen ceased making payments to CBS. The fact of the matter, of course, is that CBS had no such knowledge which it could impart to Stokely, even if it had a duty to impart.

CBS had no reason until late November 1971 to doubt that Lennen would resolve its financial difficulties. To begin with, it was dealing with a strong agency. Werle, former Credit Manager of Collections for the CBS Network Division, stated (134a):

"Q Do you ever recall making any credit checks of that sort on Lennen & Newell or Stokely-Van Camp? A Well, we had a list of approved agencies and sponsors and both of them were on that list."

Werle again stated (151a):

"Q Were reports given as to all advertising agencies? A No, there was an excludable list of the top 20, 25 agencies.

"Q And was L&N on that list? A They were on that list, yes."

Schrager, former Credit Manager of Collections for the CBS Stations Division, confirmed (159a):

"Q Would you describe that, please? A Well, Lennen and Newell of course had been one of the largest agencies in the country, billings, CBS billings to them were always very high and up until the period that I just mentioned they were regarded as a very strong advertising agency, one who paid their bills very promptly."

In the fall of 1970, the identical problem had arisen and Lennen thereafter became current. Thus, Werle testified (136a):

"Q So at what point did the payments by L&N to CBS get to the point where you found them acceptable after August and September of 1970? A Well, they caught up by the end of the year or early January with everything, then the spring of 1971 they kept on a fairly current basis."

Schrager confirmed (160a):

> "Mr. Loflin: Mr. Medina is correct. There was a problem in 1970 according to other witness' testimony which was corrected to his satisfaction and then again in 1971 and more particularly again in the summer and going on into the fall of 1971 there was a kind of ultimate problem culminating eventually in Lennen and Newell's bankruptcy.
>
> "Now, your recollection is your own affair and I am not trying to tell you what to say but——
>
> A Right, what you say seems correct."

So did Rauchenberger (121a):

> "Q Some time after your conversation in December or January with Mr. Speirs whatever the delinquent account may have been with Lennen & Newell's clients, were they brought up to date? A Yes, I remember in addition to their bringing the delinquent accounts all up to date that was about the period it was proposed in March or April of that year that the Florida Citrus Commission requested to be billed directly so that the Florida Citrus Commission would then be kept current all the time."

Similar situations with other agencies had been resolved in like successful manner, as Werle stated (147a):

> "Q So based on your experience as a credit man you felt that if you moved directly against Lennen & Newell it would cost them their accounts, their clients would look elsewhere? A Right. I could tell you former experiences with agencies we went along with the agency and the agency came through with flying colors so we did.

"Q Where the client was not advised of what was going on it all worked out? A Well, we didn't contact the client and we didn't take any action against the agencies, we just went along with the agency and extended a little more time and they came through and I guess one of the five top agencies right now.

"Q And initially is it fair to say that you hoped this was the way this would work out also? A We had every expectation it would come out that way."

The 1971 difficulties with Lennen really commenced in the period September-October 1971, at which time CBS fully expected that matters would be resolved. Werle stated (139a):

"Q So your best estimate would be it would be September before this type of report would go to Mr. Rauchenberger? A They would show in the zero to 30 column and out of the current and nobody in the business gets too excited if somebody falls in the 0 to 30 column in this business occasionally.

"Q When does the excitement begin to arise? A When it gets 60 to 90.

"Q When did that occur with Lennen & Newell? A That would probably have been, I would guess it would be November before any part of their account got to that category. I mean without seeing the status reports."

And, again (Werle dep., 146a):

"Q Well, did you express any opinion to Mr. Rauchenberger at any time in the fall of 1971 about the future prospects of Lennen & Newell? A Probably in the September early October period I

had every hope, I really believed they were going to come through.

"Q In substance you told Mr. Rauchenberger that? He seemed to agree with you? A At that time."

The commencement of CBS concern in September—October 1971 is borne out by the invoice dates shown on Exhibit 1 to the Stipulation of Fact. (11a-1) There was a significant difference between the network and the stations divisions, which operated independently of each other, on definition of current payment for calculation of time periods of 30, 60, 90 and over 90 days, particularly the danger signal of over 90 days. The network division, presumably because invoices went out promptly within the month, expected payment by the end of the following month. Thus Werle testified (137a):

"Q Let's move forward in time, Mr. Werle, into the summer of 1971, did you have occasion to notice any change in the status of the Lennen & Newell account? A Well, not in the summer to any extent because the programs were current. Probably starting in the fall we note—I really noticed that we weren't getting paid for July and August stuff.

"Q Now, in accordance with what—at least my understanding is that you would expect to be paid for July programs in August, is that correct? A By the end of August.

"Q In other words, by the end of the month following the running of the commercial you would expect to receive payment? A That's right.

"Q And you would consider that current? A It would be current for the full following month."

Rauchenberger, CBS Controller, corroborated (104a):

> "Q If you rendered an invoice and it was not paid by the end of the month following, you would then consider that account to be delinquent? A Yes, according to our calculations."

The stations division, because there was delay in mailing the invoices, expected payment two months after the *date* of the invoice since the invoice would be sent and received one month after the date. Thus, Schrager, CBS Stations Credit Manager, testified (159a-60a):

> "Q If your stations carried advertising placed through Lennen and Newell say in the month of January of any year, when would you expect payment if payment was going to be made currently? A January invoice would go out at that time approximately the 15th of February, maybe a little later than that, between the 15th and the 25th, let's say, of February and we would expect payment really a month after that or by March, let's say, by the end of March for an agency to be current.
>
> "Q Well, in general, then, was it 30 days after the invoice date? A Right, 30 days—not date of, after receipt of invoice.
>
> "Q Well, was the mailing date and the invoice date different? A Yes, they were different. The January invoice that you just described would have of course a January 31st date on it, but it wouldn't go out until as I said February 15th or 22nd."

It is thus apparent that a January invoice for the network division would not be over 90 days due until the end of May. By the same token, a January invoice for the stations division would not be over 90 days due until the end

of June. Relating these differences to the invoice dates shown on Exhibit 1 (11a-1), the earliest unpaid network invoice is June 29, 1971, which would not be over 90 days due until the end of October. The earliest unpaid invoice for the stations division is February 5, 1971, which would not be over 90 days due until the end of July. While the network over 90 days due invoices by the end of October were substantial ($103,960), the stations division over 90 days due were not substantial at the end of July ($18,-759.49) or August ($22,159.49) and did not begin to be substantial until the September-October period.

Thus it was that both the network and stations divisions began to become concerned in the September-October period as testified to by Werle for the network division (139a, 146a) and Schrager for the stations division (166a). It was then when discussions with Lennen began, continuing through November, that Stokely, unknown to CBS and contrary to its information from Lennen, was making the last few payments.

Moreover, an analysis of the internal CBS records upon which the CBS personnel relied in checking Lennen's status reveals quite conclusively the state of CBS knowledge. CBS kept track of the status of advertising agency advertiser receivables in two ways. First, its internal network and station monthly reports regarding accounts receivable from advertisers and the network monthly reports of accounts receivable from advertisers over 90 days due. Secondly, representatives of both the network and stations divisions met monthly with the New York Credit Bureau Group. There is no hint in any of those reports of Lennen's being in financial difficulty prior to the very end of November 1971 and December 1971.

The New York Credit Bureau Group included representatives from approximately two dozen broadcast media who

reported to the Credit Bureau the posture of their agency advertiser receivables and met monthly to discuss a compilation made up by the Credit Bureau from those reports. The compilations appear as Ex. NN covering the period 1970-1971. Each one of those compilations contains a list of several hundred names of advertising agencies, many of which had media advertiser receivables of hundreds of thousands of dollars, including all of the leading advertising agencies such as N. W. Ayer, BBD&O, Ted Bates, Benton & Bowles, Leo Burnett, Foote, Cone & Belding, Grey Advertising, Kenyon & Eckhardt, McCann Erickson, J. Walter Thompson, Young & Rubicam. A glance at the first of those reports, dated January 20, 1970, and the last of those reports, dated November 16, 1971, is instructive. Lennen is shown on January 20, 1970, report as having media advertiser receivables of $163,552. Concurrently, Bozell & Jacobs had media advertiser receivables of $330,310, Carson, Roberts $405,622, Clinton, Frank $455,724, Grey Advertising $733,644, Nadler & Lerner $436,620, North Advertising $602,130, Webb Associates $414,802, and Wells, Rich & Greene $683,161. By the same token, the compilation of November 16, 1971, which showed Lennen advertiser receivables at $311,386, showed media advertiser receivables of BBD&O of $144,183, Ted Bates $206,806, Benton & Bowles $156,120, Leo Burnett $248,551, Carson, Roberts $172,649, Compton Advertising $242,814, Doyle, Dane, Bernbach $211,480, Grey Advertising $144,371, and J. Walter Thompson $226,228. That same picture is true throughout the reports which appear in Exhibit NN and certainly would not give anyone cause for concern in connection with dealings between media and agencies on behalf of advertisers.

The same is true of the total monthly CBS accounts receivable of advertisers represented by Lennen for network

and stations (of which the Stokely accounts receivable by CBS were but a part). We attach herewith as Schedules 1, 2 and 3 a summary of the total figure shown on the network advertiser accounts receivable (Ex. UU), the stations advertiser accounts receivable (Ex. VV) and a composite of the two. It is clear as a bell that prior to the November 30, 1971, reports the portion of the 90 days due advertiser receivables were but a small percentage of the total advertiser receivables and Stokely receivables were but a portion of the total of Lennen advertiser receivables by CBS. With total Lennen advertiser receivables by CBS of hundreds of thousands of dollars and in some instances of over a million dollars, the presence of some thousands of dollars of advertiser receivables over 90 days due could not possibly be cause for concern.

Additional validity to our thesis is shown by an analysis, attached as Schedule 4, of the monthly status report prepared by network of *all* CBS advertiser receivables of advertisers represented by *all* agencies over 90 days due (Ex. TT). This was the report utilized by network in order to gauge when action should be taken. During the period July 1970 through November 1971, the percentage of total advertiser accounts receivable owed by all agencies over 90 days due to total advertiser receivables was, in all instances but three, less than 1%, and in the three instances the maximum percentage was 1.32%. The Lennen advertiser receivables over 90 days due were less than $700 during the period from May through October, 1971. On the November 24 report, the figure rose to $84,549 and it was not until the report of December 20, 1971, that the figure rose to $288,753.

The same picture appears in Schedule 3, the composite schedule. In that schedule, it appears, as the CBS witnesses have testified, that by May and June 1971, Lennen had

caught up. While the amounts of the advertiser receivables, and of advertiser receivables of over 90 days due, continued thereafter to rise, the total advertiser receivables were comparable to those appearing in the period July 1970-April 1971 and the advertiser receivables over 90 days due did not reach an alarming posture until the report of November 30, 1971, which shows a total of $450,748, even though the rise on October 31, 1971, to $239,311 was disquieting.

It was thus not until late November or early December that CBS began to have doubts. Werle, CBS Network Credit Manager, testified (145a-146a):

> "Q Did Mr. Rauchenberger ever express any opinion to you about whether or not Lennen & Newell was going to survive financially in the fall of 1971? A Only as late as the last week of December after we had some long very informal meetings with him that he thought they might not survive.
>
> "Q That was his opinion he expressed it to you? A (Nods.)
>
> "Q Prior to that time did he ever discuss any way or the other about Lennen & Newell? A Well, he thought for a while they were going to make it.
>
> "Q But his opinion changed about the end of November, early December? A That's right."

Schrager, CBS Stations Credit Manager, confirmed (166a):

> "Q Can you fix that in time? A Not really with a date but I know it was near the end. After we became aware that they were in bad financial condition, very bad financial condition.
>
> "Q Would you say this was late 1971 or early 1972? A It was probably around the fall of 1971."

So did Rauchenberger (128a-129a):

> "Q Did representatives of CBS attend any further meetings after February 15, 1972?
>
> ". . . . A I am quite sure we did not. I think the last meeting I personally attended was either in late November or early December. Up to that point we really thought the agency was going to continue in business and we fully expected them to pull out of the hole. After that it seemed to be a much more substantial problem than that."

Thus, one of the assumptions inherent in the District Court's decision—that CBS was in a position to warn Stokely of Lennen's impending insolvency before Stokely made the payments that are the subject of this controversy—is unsupported in the record. Patently, virtually all of the payments by Stokely had been made long before CBS personnel perceived the true extent of Lennen's problems. The District Court's statement (76a) that from "not later than some point in 1970, CBS knew that Lennen was in financial difficulty" is thus just not in accord with the facts as is clearly shown by the record.

B. CBS Believed That Stokely Was Aware of Lennen's Situation

In November 1971 CBS not only had no knowledge of the true extent of Lennen's financial problem but it had no reason whatsoever to communicate with Stokely concerning the knowledge which it did have. Deposition testimony taken by Stokely in this case and contemporaneous documents confirm those facts. The testimony appears in the depositions of Werle, Schrager and Rauchenberger. The documentary evidence appears in memoranda (Ex. 00) prepared in November and December 1971 concerning an

initial meeting of CBS personnel with Lennen personnel on October 29, 1971, two meetings of November 17, 1971, and November 24, 1971, and two meetings of December 6, 1971, and December 10, 1971, which are the only memoranda in the CBS files regarding conferences with Lennen concerning its financial difficulties. The memoranda correctly reflect what took place at those meetings (Werle dep., 152a; Schrager dep., 168a).

To begin with, Lennen, Stokely's agent, had told CBS that Stokely had been informed of Lennen's financial position. Thus, Werle, CBS Network Credit Manager, testified (151a):

> "Q Mr. Werle, in the discussion that you had in October and November and December with representatives of L&N, did they tell you anything as to what communications, if any, they had had with their advertisers concerning their position? A Well, I was led to believe that their advertisers knew of their financial condition.
>
> "Q Who told you this? A Whether it was Lou Ames or Jack Speirs, I am not sure. It was at a general luncheon meeting."

And, again (Werle dep., 153a):

> "Q In response to Mr. Medina's questions you referred to a luncheon meeting with Mr. Ames and Mr. Speirs at which one of them said something about whether their advertisers knew or did not know about their financial condition. Could you pin that luncheon meeting down in time? A I could only put it in a time frame, not an actual date. It would probably be September—middle of September to early October period.

"Q Now, can you be more specific as to whether it was Mr. Ames or Mr. Speirs who referred to the knowledge of the advertisers concerning Lennen & Newell's financial condition? A If I had to pick one of the two I would say it was Mr. Speirs. Because Mr. Speirs was always closer to the situation than Lou Ames would be."

Schrager, CBS Stations Credit Manager, confirmed (163a):

"Q Did you or anyone else at CBS propose that the advertisers be contacted directly to apprise them of the situation? A I believe that that was brought up, actually I think when they came to us or when these meetings were held the advertisers they told us had already been informed of the situation.

Q Now, when you say been informed of the situation, did they tell you they had told their advertisers they had taken in all the monies the advertisers had paid them and used it for other purposes? A. Exactly what they told their advertisers, I don't think they told us in those words but I believe they told us that the advertisers were made aware that they were delinquent in paying the bills to the media and that they were going to try to resolve the situation."

Rauchenberger, CBS Controller, assumed that to be the case (124a-25a):

"Q Well, at this time we are talking about you had assumed that Stokely-Van Camp had paid Lennen & Newell all that was due under its invoices and you knew Lennen & Newell had not kept faith with CBS and you said that it is your policy to hold

> the advertisers directly responsible. Why then didn't you notify the advertiser that you were in fact going to hold them responsible? A Of course we did, but several months later. The financial problems with Lennen & Newell at this time were very well publicized in the advertising pages of the Times. I assume at the time that Stokely-Van Camp were very much aware of the problems with Lennen & Newell as I am sure their other advertisers were. I don't know if they had the right as clients to look over their books. I assume that they knew the difficulties Lennen & Newell were having."

In addition to the testimony of Messrs. Werle, Schrager and Rauchenberger, contemporaneous documents contained in Exhibit 00 reflect that, on the basis of statements made to it by Lennen personnel, CBS believed that Stokely was well aware of Lennen's problems. For example, the memorandum of November 9, 1971, from Pabst to Hoehn concerning a meeting held to discuss Lennen's outstanding advertiser indebtedness to CBS (a meeting attended by Messrs. Campbell and Speirs of Lennen) contains the following statement: "L&N's clients have also been informed of the agency's problems."

CBS' belief that Lennen's clients were aware of its problems was further reinforced at a meeting held on November 17, 1971, and memorialized by Pabst in a memorandum of even date. As reflected in item 5 of the Pabst memorandum, Speirs announced that one of Lennen's clients, Lorillard Corp., was presently engaged in an audit of Lennen's entire business, thus lending credence to his earlier statement that Lennen's clients were aware of its difficulties (*see also* Pabst's memorandum of November 29, 1971). Finally, we have the letter of December 9, 1971,

from Lyddan, President of Lennen, to CBS in which, after recounting the agency's financial difficulties and its attempts to extricate itself therefrom, he stated that:

> "I have met and talked with all of our clients, and I have every reason to believe that they will continue their relationship with our reformed agency."

The District Court's holding that CBS may not recover because it failed to advise Stokely that Lennen was in arrears and on the brink of insolvency thus flies in the face of the overwhelming evidence that Lennen deliberately misled the media creditors into believing that the advertisers were being kept aware of the situation. Lennen was Stokely's agent, and, if it was responsible for keeping its principal in ignorance concerning the status of its failure to perform services on Stokely's behalf, CBS should not be penalized.

C. CBS Believed That Stokely Had Completed Payments to Lennen

Moreover, CBS did not know that Stokely was making payments to Lennen in November, since CBS not only assumed that Stokely had paid but was specifically informed by Lennen that Stokely had paid. Thus, Werle, CBS Network Credit Manager, testified (150a-151a):

> "Q Well, during these various discussions in 1970 and more particularly in 1971, was it your understanding, Mr. Werle, that L&N's clients had paid them but they just simply had not turned over the money to CBS? A I would have to say yes.
>
> "Q And that included Stokely-Van Camp? A They never made any—gave us an indication that they hadn't been paid by their client.

"Q Isn't it correct that on occasion spokesmen from L&N put it more positively than that to the effect that the client including Stokely had paid them but they were having some internal difficulties? A I would say yes."

Schrager, CBS Stations Credit Manager, confirmed (163a):

"Q Is it fair to say that they did not place the blame on the advertiser for the problem? A. Oh, that is true.

"Q Is it also fair to say that they indicated that the advertisers had paid but their own internal problems had caused the difficulty? A Right, that is correct."

Rauchenberg, CBS Controller, again made that assumption (108a-09a):

"Q Did the representatives of Lennen & Newell tell you the problem was internal to Lennen & Newell and in fact Stokely-Van Camp was up to date in paying Lennen & Newell? A They certainly indicated that the problems were internal to Lennen & Newell. They explained that they had problems with the acquisitions and they were trying to react by cutting staff and were eventually going to sell off all their branches. Whether or not they ever told us that Stokely-Van Camp was up to date, I don't recall. I think we assumed they were up to date because Lennen & Newell never made a claim that Stokely-Van Camp had not paid them. I don't remember them making that assertion. I think we all assumed they had been paid."

D. CBS Cannot Be Held Responsible for Lennen's Wrongdoing

The District Court's decision essentially foists upon CBS the responsibility for Stokely's own failure to check the honesty and integrity of its agent, based upon the unfounded assumption that CBS was aware of Lennen's true financial situation at the time it entered into and performed the contracts in suit. However, it is clear that all of the contracts were entered into and all of the commercials were broadcast prior to any inkling that Lennen was experiencing anything more serious then the temporary cash flow problems prevalent among many advertising agencies during that period of time. There is nothing in the record to support the finding that CBS was aware of Lennen's actual or impending insolvency prior to late November or early December 1971.

The affidavits of Ames and Speirs of Lennen (58a, 63a) do not contradict the CBS testimony with respect to the question of the CBS knowledge. The vital period is October and November 1971, because the last major payments by Stokely to Lennen totaling $37,926.15 took place in November 1971, disregarding the minor amounts of $188.70 paid in December 1971 and $1,535.95 paid in February 1972. As appears from the schedules of meetings annexed to the Ames and Speirs affidavits, neither affidavit covered meetings in October and November 1971. Yet as appears in the Pabst memoranda of November 9, November 17 and November 29 (Ex. 00), meetings were held on October 29, November 17 and November 24. The matters discussed at those meetings are set forth explicitly in the Pabst memoranda. At those meetings CBS was provided by Lennen with 1972 income forecasts and expense forecasts of November 15, 1971, and November 23, 1971 (Ex. LL) which showed a projected profit of Lennen for 1972 of $2,261,187.

It may well be that Lennen's financial situation had deteriorated badly. However, Lennen took pains to hide that fact from CBS much as it fraudently misled Stokely in its letter of December 16, 1971, concerning advertiser liability (31a) in reply to Stokely's letter of December 8, 1971, questioning its posture (Ex. QQ). Lennen knew its posture well enough. If there were any doubt on the matter, it was explicitly resolved by the CBS letter of March 13, 1971, to Lennen (Ex. PP)* which stated:

> "As you know, our basic contractual arrangement is with the advertiser, and we deal with advertising agencies as legal agents of these sponsors. The practice of being paid through the agency has developed over the years as a convenience to the sponsor and a service provided by the agency, but it does not alter our basic contract with the sponsor directly."

Lennen's letter of December 16 (31a) was plainly false, particularly in the statements (32a) "that these creditors have agreed that the responsibility to them is totally the Agency's" and (33a) "our creditors accept that responsibility to them is ours alone and is in no way to be shared".

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*This letter was written by CBS in response to a request by Florida Citrus Commission, relayed by Lennen to CBS, that CBS give up its "right of recourse" against the Commission for advertising. When CBS declined to do so, the Commission thereafter requested that CBS send the relevant invoices to it directly and the Commission paid those invoices directly to CBS. The case provides a perfect illustration of precisely what Stokely should have done in supervising its agent and providing for its own protection with respect to acts performed by its agent. While the District Court noted this instance in its opinion (77a) it failed to note the significance of the instance as illustrating that which Stokely should have been doing. The District Court was obviously misled by the fact that it incorrectly found that Lennen did not have either actual or apparent authority to act for Stokely.

But, since Stokely was clearly, at that point, on notice of conditions in advertising contracts making Stokely liable, as expressly stated in Stokely's letter of December 8 (Ex. QQ), the least it could have done at that point was to have checked with CBS and ascertained whether Lennen's letter of December 16 made correct representations. If it had done so, the matter would quickly have been clarified. Alternatively Stokely could have asked Lennen for copies of the contracts. Common prudence would dictate such a step with the large sums of money involved. Instead, on December 21, 1971, in reliance upon Lennen's representations, Stokely was content to make an additional payment to Lennen of $308,510.48, an incredible action.* Equally incredible is the fact that it was not until January 1972 that Stokely for the first time sat down with Lennen's representatives for a face to face discussion and ascertained the true facts. Stokely chose to close its eyes and rely on Lennen. But, if it did so, it must take the consequences. Patently, Lennen lied to both Stokely and CBS. Yet, Lennen was Stokely's agent and Stokely had the burden of discovery of that wrongdoing.

Stokely complains of the lack of contacts between itself and CBS, ignoring the very basic fact that the very function of an advertising agency is designed to relieve the advertiser of the burden of detailed dealings and checking, a fact which defendant presumably knew before it spent $5,000,000 a year on advertising, but is not designed to relieve the advertiser of the burden of paying for its advertising. Defendant also disagrees with the credit arrange-

*We should also add that Stokely's action in paying Lennen in November 1971 sums totaling $672,873.21, of which $37,926.15 represented payment of CBS invoices, is in itself appalling. Yet, Stokely cast upon CBS the blame for its naive action in making those payments. However, Stokely, we repeat, had the burden of checking the integrity of its own agent, an integrity which did not exist.

ments of the advertising business, likewise designed to relieve it of detailed work, and says it would have handled those matters better and acted more promptly if it had been in charge (again, a matter which it presumably knew).

All defendant had to do was to lift up the telephone and call CBS and state that it wanted to check precisely what Lennen was doing and the posture of its payments, in which case it could have easily ascertained those facts. Defendant had the duty to make the telephone call, not CBS.

III.

Stokely is estopped from asserting against CBS the wrongdoing of its agent Lennen.

The key to this case is Lennen—the only question is whether Stokely or CBS is responsible for Lennen's lies. The answer is clear. The master is responsible for the acts of its servant and CBS, which performed its services and has not been paid, should be paid by Stokely which retained Lennen to do its work and received and accepted the benefits of CBS' services.

Lennen did one thing right—it expressly contracted in writing with CBS "acting as agent for" Stokely. Lennen had express authority by reason of its position as advertising agent for Stokely.* Lennen had authority by reason

*After all, Stokely was paying Lennen for its services in acting as agent. That payment took place by reason of the invoices exchanged between the parties. Assuming a hypothetical bill for $100, CBS would bill Lennen for $100 less 15%, *i.e.*, $85. Lennen, in turn, would bill Stokely for $100. Stokely in turn, would pay Lennen the $100, *i.e.*, $85 to be transmitted to CBS and $15 for Lennen to retain to itself for its services as agent. This method of invoicing is shown quite clearly by all invoices sent by CBS to Lennen (Exs. E, H, J, L, N, P, R, T, V, X, Z, BB, DD, FF, HH) and the invoices sent by Lennen to Stokely (Exs. RR, SS). The amount for which suit is here brought includes only the net amount billed by CBS to Lennen, *i.e.*, the 85%. For clearly, Lennen has received, and retained to itself in payment for its services, the remaining 15%.

of that position and Stokely never told it (nor CBS) that it did not have that authority. Lennen also had apparent authority by reason of its continuous and substantial actions on behalf of Stokely for seventeen years and Stokely's failure to deny that fact or inform anyone to the contrary. CBS was entitled to rely on that apparent authority and it clearly did rely by its action in contracting expressly with Lennen "on behalf of" Stokely.

Thereafter, Lennen committed the wrongdoing which led to this suit. Lennen lied to CBS by stating (1) that Stokely had paid all and (2) that Stokely had been told of Lennen's failure to pay CBS. CBS thus had no reason to tell Stokely anything. Lennen committed fraud on Stokely by its failure to tell Stokely (1) of its failure to pay CBS and (2) that the contracts between Lennen and CBS were with Lennen "acting as agent for" Stokely. Lennen went further. It lied to Stokely concerning the basis of its contracts with CBS when it well knew both what those contracts were and that CBS would hold Stokely to those contracts as CBS had expressly written to Lennen.

There was no reason for CBS to discover that wrongdoing. Lennen's actions were entirely consistent with its position as agent for Stokely, a position that Stokely had given Lennen. Stokely should have discovered the wrongdoing yet it did nothing whatsoever to assure itself that Lennen was doing what Stokely thought it was doing. We submit that Stokely is clearly estopped from asserting against CBS the wrongdoing of its agent Lennen.

It is a novel doctrine indeed which imposes upon the worker the duty of discovering the wrongdoing of the servant who ostensibly is carrying out the wishes of its master. That duty is that of the master and Stokely must shoulder the penalty of its failure to fulfill that duty. And fulfillment of that duty by Stokely was not onerous. It had only to lift up the telephone and call CBS. This case

is not much different from the man who bought the Brooklyn Bridge in the classic story. Rauchenberger could not have put it more accurately:

> "They are a major advertiser and I assume they have knowledge of the business they are doing." (*Supra* at p. 25.)

Against that background let's read the District Court's opinion. The opinion states that CBS did not rely on Lennen's position as apparent agent (81a)—yet CBS sent Lennen written contracts "acting as agent for" Stokely. The opinion states that CBS did not inform Stokely of its talks with Lennen (82a)—yet Lennen, Stokely's agent, assured CBS that Stokely had been told and that Stokely had made all payments, so that for CBS to inform Stokely would have been to no avail.

Stokely was innocent because it took no precautions whatsoever and put Lennen in a position to commit fraud. CBS was innocent because it relied on the Lennen statements as to authority and as to Stokely's knowledge and action. Since both CBS and Stokely were innocent because they relied on Lennen, Stokely must bear the loss caused by the representative it hired.

The District Court missed this vital point because of its erroneous initial conclusion that Lennen had neither actual nor apparent authority to represent Stokely. But that erroneous conclusion ignores the rather basic fact that Lennen was, by its own definition as accepted by Stokely, an "advertising agent" so that payment to the agent cannot constitute payment to the media any more than payment to a travel agent is payment to the carrier should the agent go bankrupt prior to the trip. The carrier, naturally, would still expect to be paid or the traveller would not travel. The only difference is that such a payment to a travel agent

would be made before the service is rendered so that the carrier can enforce its demand. Here the payment was made after the service so that CBS cannot enforce its demand and must depend upon the Court.

This case thus boils down to the question of who had the duty of checking the honesty of Lennen & Mitchell—Stokely who engaged it to place the ads and thus validated its integrity or CBS who was rendering the services for the benefit of Stokely. The answer is clear as a bell. In essence, Stokely completely disregards what the terms "agency" means.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and vacated and judgment should be directed in favor of CBS as demanded, with costs in favor of CBS.

December 18, 1974.

Respectfully submitted,

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SCHEDULE 1

CBS v. Stokely-Van Camp

Total network accounts receivable by CBS from advertisers represented by Lennen July 1970 through November 30, 1971 as shown by CBS monthly statements (Ex. UU).

Date	Total	Over 90
Aug. 1, 1970	874,685	20,593
Sept. 5, 1970	648,227	15,529
Oct. 3, 1970	511,141	17,800
Oct. 31, 1970	777,196	24,191
Dec. 5, 1970	1,109,679	22,790
Jan. 2, 1971	807,091	8,925
Jan. 31, 1971	806,905	1,177
Feb. 26, 1971	625,444	373
Apr. 3, 1971	1,038,299	42,448
May 1, 1971	700,410	677
May 23, 1971	167,952	373
July 3, 1971	128,255	373
July 31, 1971	330,994	373
Aug. 26, 1971	555,971	373
Sept. 30, 1971	608,880	601
Oct. 31, 1971	604,667	84,549
Nov. 30, 1971	770,199	288,753

SCHEDULE 2

CBS v. Stokely-Van Camp

Total station accounts receivable by CBS from advertisers represented by Lennen July 1970 through November 30, 1971 as shown by CBS monthly statements (Ex. VV).

Date	Total	Over 90
Aug. 1, 1970	47,868	00.00
Sept. 5, 1970	152,824	38,747
Oct. 3, 1970	112,111	4,287
Oct. 31, 1970	99,560	10,964
Dec. 5, 1970	66,802	3,338
Dec. 31, 1970	85,480	4,218
Jan. 30, 1971	106,182	27,771
Feb. 27, 1971	123,008	60,248
Mar. 31, 1971	111,500	59,509
May 1, 1971	163,485	48,730
May 31, 1971	162,573	68,523
June 30, 1971	213,202	87,669
July 31, 1971	176,259	74,524
Aug. 31, 1971	177,577	110,382
Sept. 30, 1971	154,728	136,857
Oct. 30, 1971	178,836	154,762
Nov. 30, 1971	221,855	161,995

SCHEDULE 3

CBS v. Stokely-Van Camp

Total accounts receivable by CBS from advertisers represented by Lennen July 1970 through November 30, 1971 as shown by CBS monthly statements (Exs. UU, VV).

Date		Total	Over 90
UU	VV		
Aug. 1, 1970	Aug. 1, 1970	922,533	20,593
Sept. 5, 1970	Sept. 5, 1970	801,051	54,276
Oct. 3, 1970	Oct. 3, 1970	623,252	22,087
Oct. 31, 1970	Oct. 31, 1970	876,756	35,155
Dec. 5, 1970	Dec. 5, 1970	1,176,481	26,128
Jan. 2, 1971	Dec. 31, 1970	892,571	13,143
Jan. 31, 1971	Jan. 30, 1971	913,087	28,948
Feb. 26, 1971	Feb. 27, 1971	748,452	60,621
Apr. 3, 1971	Mar. 31, 1971	1,149,799	101,956
May 1, 1971	May 1, 1971	863,895	49,407
May 29, 1971	May 31, 1971	330,525	68,896
July 3, 1971	June 30, 1971	341,457	88,042
July 31, 1971	July 31, 1971	507,253	74,897
Aug. 26, 1971	Aug. 31, 1971	733,548	110,755
Sept. 30, 1971	Sept. 30, 1971	763,608	137,458
Oct. 31, 1971	Oct. 30, 1971	783,503	239,311
Nov. 30, 1971	Nov. 30, 1971	992,054	450,748

SCHEDULE 4

CBS v. Stokely-Van Camp

Total network accounts receivable by CBS from advertisers over 90 days due July 1970 through November 30, 1971 as shown by CBS monthly network status reports of all advertiser accounts receivable by CBS over 90 days due (Ex. TT). In each instance the percentage of total accounts receivable over 90 days due to total receivables constituted less than 1.33%.

Report Date	Amount	Status Date
Aug. 25, 1970	20,593	Aug. 1, 1970
Sept. 23, 1970	15,529	Sept. 5, 1970
Oct. 23, 1970	17,800	Oct. 3, 1970
Nov. 19, 1970	24,191	Oct. 31, 1970
Dec. 23, 1970	22,790	Dec. 5, 1970
Jan. 20, 1971	8,925	Jan. 2, 1971
Feb. 19, 1971	1,177	Jan. 31, 1971
Mar. 18, 1971	373	Feb. 28, 1971
Apr. 21, 1971	42,448	Mar. 31, 1971
May 19, 1971	677	Apr. 30, 1971
June 17, 1971	373	May 31, 1971
July 23, 1971	373	June 30, 1971
Aug. 23, 1971	373	July 31, 1971
Sept. 24, 1971	373	Aug. 31, 1971
Oct. 22, 1971	601	Sept. 30, 1971
Nov. 24, 1971	84,549	Nov. 24, 1971
Dec. 20, 1971	288,753	Nov. 30, 1971